U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 December 2003

CASE NO: 1998-STA-28

In the matter of

LARRY E. EASH, SR.
Complainant

v.

ROADWAY EXPRESS, INC.
Respondent

APPEARANCES:

Paul O. Taylor, Esquire
For the Complainant

John T. Landwehr, Esquire
For the Respondent

BEFORE: The Honorable Gerald M. Tierney

RECOMMENDED DECISION AND ORDER

Procedural History

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (the "STAA"), as amended, 49 U.S.C.A.§ 31105(a), and its implementing regulations, 29 C.F.R. Part 1978 (2002). The Complainant, Mr. Larry E. Eash, filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that the Respondent, Roadway Express, violated Section 405 of the STAA when they disciplined him for refusing to drive a commercial motor vehicle on December 10, 1997 and March 21, 1998.

On July 9, 1998, the Assistant Secretary of OSHA found the complaint to be without merit. The Complainant appealed the decision of the Secretary to the Office of Administrative Law Judges on August 4, 1998. The case was set for hearing. An oral Settlement Agreement

was reached before the hearing. When the Agreement was reduced to writing, the Complainant refused to execute it.

Attorney John Tucker, who had signed the Agreement, withdrew from the case and the Complainant retained Mr. Paul Taylor, Esquire as counsel. Thereafter, the Respondent filed a Motion to Enforce Settlement Agreement. A formal hearing was held to determine whether the Settlement Agreement must be enforced. The Respondent's Motion to Enforce the Settlement Agreement was granted. *See Eash v. Roadway Express, Inc.,* ALJ No. 1998-STA-28 (February 3, 1999).

The Complainant appealed to the Administrative Review Board (the "Board") on October 29, 1999, which determined that the Settlement Agreement was unenforceable. They remanded the claim for a decision on the merits. *See Eash v. Roadway Express, Inc.,* ARB No. 99-037 (October 29, 1999).

Before the claim reached formal hearing, the Respondent filed a Motion for Summary Judgment. The Motion in favor of the Respondent was granted on May 11, 2000. *See Eash v. Roadway Express, Inc.,* ALJ No. 1998-STA-28 (May 11, 2000).

The Complainant appealed the decision granting summary decision to the Board. On December 31, 2002, the Board reversed the grant of summary judgment and remanded the claim for an evidentiary hearing. *See Eash v. Roadway Express, Inc.,* ARB No. 00-061 (December, 31, 2002).

A formal evidentiary hearing was held on June 19, 2003, in Akron, Ohio. The parties' Joint Exhibits one through ten; the Respondent's Exhibits A through G and; the Complainant's Exhibits two, four through nine, and eleven through fourteen were admitted into evidence (Tr. 6-8, 101, 104-106, 113-115, 119). The Complainant, his wife, Doris Kathleen Eash, and the Respondent's employees Mark Edward Rosendale, Jeffery John Olszewski, and Tim Doody testified. Both parties submitted initial and reply briefs.

Background

The Complainant has worked for Respondent since 1988 as a line haul driver. In 1997 and 1998, he was an extra board driver at Respondent's Copley, Ohio terminal. As an extra board driver, he had no set schedule. He was not told when or where he would be driving until he received a dispatch call. *See* Joint Stipulations of the Parties (JX 10).

An extra board driver has two hours to report to work after he receives a dispatch call. When he returns to his home terminal, he is eligible for ten hours off duty (JX 10). If a driver is away from home, he is eligible for a work call after eight hours off duty (Tr. 12). After six consecutive tours of duty are completed, forty-eight hours of uninterrupted time off may be requested. Once a driver has been off for at least sixteen hours, he may request an additional eight hours off duty (a "slide"). In order to receive the additional time off, a driver must request it before he receives a dispatch call (JX 10). A driver is unable to request a slide after he has been off duty for forty-eight uninterrupted hours (Tr. 184).

There are two incidents when the Complainant refused work calls from the Respondent. These occurred on December 10, 1987 and March 21, 1998.

Statutory Requirement

To prevail on a claim under the STAA, a complainant must show that: (1.) he engaged in protected activity; (2.) his employer was aware of the protected activity; (3.) his employer discharged, disciplined, or discriminated against him and; (4.) a causal connection existed between the protected activity and the adverse action. *Roadway Exp., Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987).

If evidence of a nondiscriminatory reason for the adverse employment action is shown by the employer, then the complainant must prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The complainant must establish not only that the asserted reason presented by the respondent is false, but also that discrimination was the true reason for the adverse action. The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

Under the STAA, a driver's refusal to work because of fatigue may be determined to be protected activity either under section 31105(a)(1)(B)(i) or 31105(a)(B)(ii). Pursuant to § 31105(a)(1)(B)(i), an employer may not discharge, discipline, or discriminate against an employee if the employee refuses to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105 (a)(1)(B)(i).

The regulation at issue is the "fatigue rule." It provides that no driver is permitted operate a commercial motor vehicle, and a motor carrier may not require or allow a driver to operate a commercial motor vehicle, "while the driver's ability or alertness is so impaired, or so likely to become impaired, … as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 392.3.

A driver's good faith belief in a violation of the fatigue rule is not sufficient. A driver must prove that operation of a vehicle would in fact violate the specific requirements of the fatigue rule. *Somerson v. Yellow Freight System, Inc.,* 1998-STA-9 and 11 (ARB Feb. 18, 1999) quoting *Cortes v. Lucky Stores, Inc*., 983 F.2d 1195, 1199, slip op. at 4 (2d. Cir. 1993) (quoting *Yellow Freight Systems v. Martin* 983 F.2d 1195, 1199 (2d Cir. 1993)).

Under section 31105(a)(B)(ii), a driver must prove that he had a "reasonable apprehension of serious injury" to himself or the public "because of the vehicle's unsafe condition." 49 U.S.C. § 31105 (a)(1)(B)(ii). A driver's apprehension of serious injury is considered "reasonable" if a reasonable person in the driver's circumstances would conclude that there was a reasonable apprehension of serious injury. *Somerson v. Yellow Freight System, Inc.,* 1998-STA-9 and 11 (ALJ Feb. 18, 1999), quoting *Byrd v. Consolidated Motor Freight*, ARB

Case No. 98-064, ALJ Case No. 97-STA-9, ARB Final Decision and Ord., May 5, 1998, appeal filed May 27, 1998 (11th Cir.); 49 U.S.C. 31105 (a)(2).

Issues

1. Whether the Complainant refused to operate a motor vehicle on December 10, 1997 and March 21, 1998, because his alertness or ability was so impaired, or so likely to become impaired, due to fatigue, as to render it unsafe for him to begin or continue to operate a commercial vehicle.

2. Whether an actual violation of the fatigue rule would have occurred if the Complainant had accepted the work assignments.

3. Whether the Complainant's refusal of the work assignments was based on a reasonable apprehension of serious injury to himself or the public.

4. Whether the Complainant deliberately made himself unavailable for work.

5. Whether the Complainant was disciplined for engaging in protected activity on December 10, 1997 and March 21, 1998.

The December 10, 1997 Incident

On December 7, 1997, the Complainant earned forty-eight hours off duty after completing six tours of duty.[1] At approximately 7:30 p.m. on December 9, 1997, the Complainant went on duty. He drove from the Copley, Ohio terminal to Buffalo, New York. On his way home from Buffalo, he took a sleep break from 1:30 a.m. to 4:00 a.m. in the tractor cab (JX 10).[2]

On December 10, 1997, the Complainant went off duty at approximately 7:15 a.m. (JX 10). He testified that he completed paperwork and then drove home from the Copley terminal (Tr. 35-37). He slept from approximately 8:30 a.m. to 12:00 or 1:00 p.m., when he naturally awoke (Tr. 37-39, 126-128). He then organized his workshop (Tr.38). The Complainant attempted to sleep later that day, but was unable to do so (Tr. 142).

He was eligible for a work call at approximately 5:15 p.m. and a slide at approximately 11:15 or 11:20 p.m. (Tr. 40-41). Because he did not receive a work call when he became eligible, he called Respondent's recorded message board to find out when he might be assigned a run (Tr. 139-140). The recording indicated that the Complainant was scheduled to receive a call somewhere between the thirty-second and thirty-fifth driver (Tr. 140-141). At approximately 11:00 p.m. that evening, he sat down to watch the news and fell asleep (Tr. 43-44, 144).

[1] Please see Appendices A and B. They contain a description of the Complainant's work and sleeping schedules on the days preceding the December 10, 1997 and March 21, 1998 work calls.
[2] The truck-tractor was not equipped with a sleeper berth (JX 10).

The Complainant received a work call from Respondent's dispatcher, Ms. Connie Dean, at 11:35 p.m. She dispatched him from Copley, Ohio to Stroudsburg, Pennsylvania. After Ms. Dean hung up the telephone, the Complainant immediately called her back and requested a slide (JX 10). The Complainant claims that he told Ms. Dean that he had intended to request a slide, but had fallen asleep. After Ms. Dean told him that he was not eligible to slide, he replied that he was "too sleepy and in no condition, physically or mentally," to get into a commercial vehicle and take it down the road for the Company (Tr. 47, 146).

Ms. Dean transferred the call to the Assistant Relay Manager Jeff Olszewski. After talking with Mr. Olszewski, the Complainant refused the dispatch call (JX 10). He said he told Mr. Olszewski that he was too tired to drive and wanted to slide or an additional four hours of rest. Mr. Olszewski informed him that he was unable to slide because he had failed to request one before he was dispatched (Tr. 49-50, 148). He told the Complainant that he would be moved to the bottom of the job board and receive a warning (Tr. 50).

A Letter of Warning was issued by the Respondent as a result of this incident (JX 10). This was discussed at a meeting with the Respondent's Relay Managers Mr. Mark Rosendale and Mr. Olszewski (Tr. 53-54.) The Complainant formally protested the letter (JX 4).

The Complainant argues his sleep was not restful on the morning of December 10, 1997. During the thirty-hour period prior to December 10, 1997, he had no more than four and one-half hours of sleep. He contends that he was accustomed to sleeping nighttime hours. If the Complainant had accepted the call, he would have been driving at night, awake for twenty-two consecutive hours, and driven at a time when he is prone to sleepiness. The Complainant said he tried to stay awake on December 10, 1997, but was unsuccessful. *See* Brief of Complainant at 12-18.

The Respondent maintains that the Complainant had adequate rest prior to the December 10, 1997 work call because he had his required six hours of sleep. According to the Respondent, the Complainant slept for approximately eight hours every night from December 6, 1997 to December 9, 1997, and approximately six to seven hours on December 10, 1997. *See* Brief of Respondent at 4-7.

They assert that if the Complainant was fatigued, he should have made arrangements with the employer prior to receiving the work call. They point out that the Complainant was awake on December 10, 1997, during the period that he was eligible to slide and failed to inform Mr. Olszewski that he was fatigued. *See* Brief of Respondent at 15-16. In addition, the Complainant could have stopped in route and slept if he was fatigued. *See* Reply Brief of Respondent at 3.

They also maintain that the Complainant did not allow himself any time to become awaken or alert. After he received the December 10, 1997 work call, he did not attempt to prepare himself to drive by getting out of his chair, taking a shower, eating, or packing. *See* Brief of Respondent at 8.

The Respondent relies on the inconsistencies contained in the Complainant's deposition transcript and trial testimony concerning the time that he became eligible to slide and the time that he fell asleep on December 10, 1997. They contend that the Complainant's testimony concerning this incident is not credible. *See* Reply Brief of Respondent at 2.

The Complainant replies that the amount of time that he slept prior to December 10, 1997, is not probative of whether he was in fact fatigued on December 10, 1997. He explained that his sleep on the morning of December 10, 1997, was not restful because it was fragmented and the truck that he rested in did not contain a sleeper berth. *See* Reply Brief of Complainant at 2-4.

The Complainant asserts that his testimony concerning his fatigue is credible because his truck driving experience provided him with the ability to discern whether or not he is fatigued. The fact that he could not stay awake to request a slide demonstrates that he was fatigued. *See* Reply Brief of Complainant at 2-5.

The March 21, 1998 Incident

The next incident began on March 19, 1998. The Complainant completed a sixth tour of duty, earning forty-eight hours of uninterrupted duty time off. He would not be subject to recall until March 21, 1998 at 1:44 a.m. (JX 10).

The following activities occurred during that period. On March 19, 1998, the Complainant slept for approximately six and one half to seven hours during the day. He then slept from 11:00 p.m. March 19, 1998 to 7:00 a.m. March 20, 1998 (Tr. 71, 160). On March 20, 1998, he went shopping with his wife (Tr. 160-161). He attempted to sleep from 3:00 p.m. to 5:00 or 5:30 p.m., but was not sleepy (Tr. 73-74, 161-162, 182). From approximately 7:00 p.m. to 9:00 p.m., he attended a party that his wife was hosting. He returned home and went to bed at 9:30 p.m. (Tr. 74-75). The Complainant said that it took him between one to one and one-half hours to fall asleep (Tr. 75).

At 1:21 a.m., twenty-three minutes prior to the expiration of the Complainant's forty-eight hours off, Company Dispatcher Gary Kiser called the Complainant who accepted an assignment for a run to Jamestown, Ohio. After he received the call, he fell back to sleep (JX 10). The Complainant said that approximately one hour after he received the call, he got up from bed to use the bathroom. When he returned to bed, his wife asked him what he was doing because an hour before, he had accepted a work call (Tr. 76-77).

The Complainant then decided to check his logs because he believed that the Respondent called him before his forty-eight hours of rest had expired (Tr. 77). After he realized that he had been called prematurely, he called Mr. Kiser back around 2:24 a.m. and informed him that he was fatigued and needed more time to sleep (Tr. 79). Mr. Keiser admitted the mistake and then transferred the Complainant to Tim Doody, the Respondent's Relay Coordinator. Mr. Doody offered to reinstate the work call and provide the Complainant two hours to report to work form that moment (Tr. 79-80; JX 10). The Complainant alleges he informed Mr. Doody that he was

too tired to safely operate a commercial motor vehicle and needed an additional four hours to rest (Tr. 82-84, 86).

Ultimately, the Complainant refused Mr. Doody's offer and the work assignment. As a result, the Respondent disciplined him with a five-day suspension (JX 10).

The Complainant stated that he slept seventeen hours in the period from March 18, 1998 to March 21, 1998. He slept from one o'clock p.m. on March 18, 1998 to seven o'clock a.m. on March 19, 1998. He slept for two and one-half hours from March 20, 1998 to March 21, 1998. Had the Complainant accepted the work assignment, he says he would have driven at a time when he is prone to sleepiness. *See* Brief of Complainant at 13-16.

The Respondent maintains that the Complainant's allegations of fatigue are inconsistent with his actions. The Respondent pointed out that the Complainant discussed the call with his wife, walked down stairs to review his logs, realized that he was called twenty-three minutes prematurely, and engaged in a lengthy conversation with Mr. Doody. The Complainant never said that he was fatigued or that he needed additional time to rest. He informed Mr. Doody that he was called prematurely and requested that he be provided the weekend off. He did not allege that he was fatigued until after he was given the driving assignment. He refused Mr. Doody's offer to reinstate the work call which would have provided him with an additional two hours of rest. *See* Brief of Respondent at 11-12, 15-17.

Although the Complainant said that he may have been rested if he had not been called twenty-three minutes early on March 21, 1998, the Respondent explained that the Complainant received an additional hour of rest that night by falling back asleep after he received the call. When reminded of the additional time, the Complainant stated that such rest was not restful, but failed explain why it wasn't restful. *See* Brief of Respondent at 11.

In reply, the Complainant argues that he only obtained seventeen hours of sleep from the time that he began his tour of duty on March 18, 1998 until the time he received the March 21, 1998 work call. He explained that the additional hour of rest that he obtained the morning of March 20, 1998, was not restful because it was fragmented. The fact that he did not recall receiving the call shows that he was fatigued. *See* Reply Brief of Complainant at 5-6.

The Complainant asserts that his refusals are protected activity because his "ability or alertness was so impaired, or so likely to become impaired, through fatigue, that it would have been unsafe for him to begin or continue to operate a motor vehicle." *See* Brief of Complainant at 12-13. The Complainant maintains that the amount of time that he was awake and the number of hours that he worked prior to receiving the work assignments in question may be relied upon to determine whether operation of a vehicle would have been unsafe. *Spearman v. Roadway Express, Inc*., 1992-STA-1 (Sec'y June 30, 1993), *aff'd sub nom*. *Roadway Express, Inc. v. Reich*, 34 F.3d 1068, 1994 U.S. App. Lexis 22924 (6th Cir. 1994). *See* Brief of Complainant at 14. Had the Complainant operated a motor vehicle on the days in question, he contends an actual violation of 49 C.F.R. § 392.3 would have occurred. *See* Brief of Complainant at 17.

The Complainant explained that a person's circadian rhythm is affected when their sleeping schedule is irregular. Also, fragmented sleep is not as restorative as continuous sleep and nighttime sleep is not as restorative as daytime sleep. The Complainant went on to state that people are normally sleepier at night and people who are awakened during their principal sleeping period are more likely to have reduced alertness. Also, shift-workers may have difficulty adjusting to an inverted schedule, regardless of whether a consistent sleeping schedule is established, because physiological and performance levels are low after midnight and in the early to mid afternoon. *See* Brief of Complainant at 15-17, quoting 65 F.R. 25553, 25561-25562 and 25587.

The Respondent asserts that the Complainant did not engage in protected activity. According to the Respondent, the Complainant suffered from "momentary tiredness after a brief nap." The Complainant failed to follow the Respondent's work rules because either "he did not get sufficient rest or simply did not want to work." *See* Brief of Respondent at 8, 20.

DISCUSSION AND RATIONALE

The Complainant failed to prove that a violation of § 31105(a)(1)(B)(i) occurred. Operation of a vehicle by the Complainant on December 10, 1987, would not have violated the specific requirements of the fatigue rule. The Complainant's ability or alertness was not so impaired, or so likely to become impaired, that it would have made it unsafe for him to begin or continue to operate a commercial motor vehicle. Prior to the December 10, 1997 work call, the Complainant had adequate sleep. He testified that he requires six hours of sleep in a twenty-four hour period to "adequately function." (Tr. 63-64, 125). The Complainant slept approximately eight hours the evenings of December 6, 1997, December 7, 1997, and December 8, 1997 (Tr. 24, 26-27). On the morning of December 10, 1997, he slept for two and one-half hours (JX 10). He then slept from 8:30 a.m. to 12:00 p.m. or 1:00 p.m. (Tr. 37-39, 126-128). Thus, he slept for a total of six to seven hours on December 10, 1997, before he received the work call.

I find that the Complainant was rested prior to the March 21, 1998 work call. On March 19, 1998, he slept for six and one-half to seven hours during the day and eight hours at night (Tr. 69-71, 160). Although he could not fall asleep, he rested from approximately 3:00 p.m. to 5:00 or 5:30 p.m. on March 20, 1998 (Tr. 73-74, 161-162, 182). He then rested/slept sometime between 9:00 or 9:30 p.m. for approximately two hours and nine minutes to two hours and thirty-nine minutes until he received the work call (Tr. 75). After the call, the Complainant slept for an additional hour (Tr. 76-77). Thus, prior to receiving the March 21, 1998 call, he rested/slept for a total of five to six hours.

Despite the Complainant's contention of fatigue, it is apparent that he was mentally coherent on this day. After his wife informed him of the call, he discussed the call with his wife, walked downstairs and reviewed his logs, and realized that he was called a few minutes prematurely (Tr. 76-79).

The Complainant also failed to show that he "sought from the employer, and [was] unable to obtain, correction of the unsafe condition" as required by the STAA. 49 U.S.C. §

31105 (a)(2). On March 21, 1998, the Complainant rejected Mr. Doody's offer to reinstate the call to provide the Complainant with additional time to sleep (Tr. 248; JX 10).

Whether the Complainant's Refusal of the Work Assignments was Based on a Reasonable Apprehension of Serious Injury to Himself or the Public.

The Complainant argues that he had a reasonable apprehension of serious injury to himself or the public. In support, he stated that he was sleepy when he refused the work calls and his condition would have worsened if he had accepted the calls. *See* Brief of Complainant at 17-18.

The Respondent asserts that the Complainant's claims of sleepiness are insufficient as a matter of law to show a "reasonable apprehension of serious injury due to fatigue." According to the Respondent, the STAA does not prevent employers from enforcing reasonable work rules or protect a driver who fails to rest despite an adequate time to rest. The Complainant worked for the Respondent for ten years and should have been aware of the procedures and the importance of getting sufficient rest. *See* Brief of Respondent at 19-20.

I find that the Complainant failed to show that a violation under § 31105(1)(B)(ii) occurred. A reasonable person in the Complainant's circumstances would not have had a reasonable apprehension of serious injury. The Complainant had at least six hours of sleep prior to receiving the December 10, 1997 work call (Tr. 29-30, 37, 126-128). On March 20, 1998, he rested/slept for approximately five to six hours (Tr. 73-77, 161-162, 182). He had forty-eight hours off work from March 19, 1998 to March 20, 1998, and slept for eight hours the evening of March 19, 1998 (Tr. 71, 160; JX 10).

The legitimacy of the Complainant's fatigue is questionable. In both incidents, he failed to claim fatigue in his first contact with the Respondent. The facts surrounding the second incident highlight the lack of veracity.

After being reawakened by his wife, the Complainant's first reaction was not to call the company and claim fatigue as would be expected, but to check his records in the hope that he could prove the company committed a violation of the regulations. A possible motive for this reaction is provided by Mr. Doody. He testified that the Complainant's first communication was to request the weekend off. Only after he learned he would only be given an extra two hours of rest, rather than the hoped for free weekend, did he say he was too fatigued to drive (Tr. 246-249).

Whether the Complainant Deliberately Made Himself Unavailable for Work.

The Complainant argues that he did not deliberately make himself unavailable for work. In his opinion, he took reasonable measures to rest before he refused the two dispatch calls. He contends he did not act unreasonably when he cleaned his garage on December 10, 1997, and spent two hours at his wife's party on March 21, 1998. The Complainant explained that he slept nighttime hours from December 1, 1997 to December 9, 1997, and slept approximately eight hours on the evenings of December 7, 1997 and December 8, 1997. On December 10, 1997, he

took a sleep break from 1:30 a.m. to 4:00 a.m. in the tractor cab. He then slept from 8:30 a.m. until approximately 12:00 or 1:00 p.m. that same day, but was no longer tired when he naturally woke. *See* Brief of Complainant at 21-24.

Citing *In the Matter of Albert Porter v. Greyhound Bus Lines*, ARB Case No. 98-116; ALJ Case No. 96-STA-23, slip op. at 2 (1998), the Respondent asserts that the Complainant deliberately made himself unavailable for work because he had adequate time to rest, but failed to make reasonable attempts to be rested. According to the Respondent, the Complainant was off duty for over sixteen hours prior to receiving the December 10, 1997 work call. He was off duty for over forty-eight hours prior to the March 21, 1998 work call. The Complainant acknowledged that nothing prevented him from getting sleep during those two periods, except his inability or unwillingness to sleep. *See* Brief of Respondent at 9, 16-18.

Even if the Complainant was fatigued, I find that he deliberately made himself unavailable for work. He had an ample opportunity to rest, but failed to do so. The STAA does not protect an employee who deliberately makes himself unavailable for work "by not taking advantage of his time off to become rested and available when called." *Porter v. Greyhound Bus Lines*, 1996-STA-23, 3 (ARB June 12, 1998).

The Complainant earned forty-eight hours off on December 7, 1997 (JX 10). He returned home from his December 9, 1997 work assignment sometime between 7:15 a.m. to 8:30 a.m. on December 10, 1997 (Tr. 36-37, 126-128; JX 10). He was aware that he was eligible for a work assignment at 5:15 p.m. that night (Tr. 40-41). Thus, the Complainant had approximately eight hours and forty-five minutes to rest before he became *eligible* for a work call. He was also provided an additional six hours to rest after he became eligible because he was not called to work until 11:35 that night (JX 10).

The Complainant argues that it was not unreasonable for him to clean his garage during the day December 10, 1997, and attend his wife's party on March 20, 1998. He explained that he attempts to "live a normal life by spending time with his family, working around the house, and other normal everyday activities." *See* Brief of Complainant at 2, 23.

I do not find it unreasonable for a person to make time for his family and social life. It is unreasonable, however, for a person who operates a commercial motor vehicle to fail to set aside sufficient time to rest before work. It was the duty of the Complainant to act as if he was going to receive a work call at 5:15 p.m. on December 10, 1997, and at 1:44 a.m. on March 21, 1998. The facts show that he did not. By the time that the Complainant received the December 10, 1997 work call, he had fourteen hours and forty-five minutes to rest and clean his garage, but only slept from 8:30 a.m. to 12:00 or 1:00 p.m. that day (Tr. 37-39, 126-128). On March 21, 1998, he slept from 3:00 p.m. to 5:00 or 5:30 p.m. and did not obtain additional sleep until 9:30 p.m., four to four and one-half hours before he was eligible for the work call (Tr. 73-75, 161-162; JX 10). The fact that the Respondent telephoned him twenty-three minutes early is irrelevant. After the Complainant received the work call, he slept for an additional hour (Tr. 76-77). He failed to explain why this additional hour of sleep was not restful.

Whether the Complainant was disciplined for engaging in protected activity on December 10, 1997 and March 21, 1998.

The Complainant argues that his refusals of the work calls are not a legitimate nondiscriminatory reason for the Respondent's adverse action. In his view, the Respondent's explanation for their adverse action is legally insufficient. *See* Brief of Complainant at 24.

The Complainant maintains the Respondent had knowledge of his protected activities and took adverse action against him because of such activities. He asserts that he told the Respondent on December 10, 1997, that he needed to take a slide because he was sleepy and not physically and mentally able to operate a motor vehicle safely. After receiving a warning letter for refusing the December 10, 1997 dispatch call, he protested the letter. With regard to the March 21, 1998 work call, the Complainant said that he informed the Respondent that he was fatigued, in no condition to operate a motor vehicle, and needed more time to rest. The Respondent suspended him because he refused the call and he sent a protest letter. *See* Brief of Complainant at 18-20, 25. The Complainant points to the testimony of Mr. Olzewski to support this position. The fact that Mr. Olzewski admitted that the Complainant requested a slide and stated that he "needed additional time to rest" on December 10, 1997, shows that the Respondent had knowledge of the Complainant's protected activity. *See* Reply Brief of Complainant at 4.

The Complainant argues that it was unnecessary for him to specifically state to the Respondent that he was "fatigued." He contends that his statements are sufficient to establish protected activity. *See* Brief of Complainant at 20-21.

Although the Complainant may have told Mr. Olszewski on December 10, 1997, that he "needed additional time to rest," the Respondent argues that they were never placed on notice of the Complainant's protected activities because the Complainant never stated that he was "fatigued." The Respondent explained that in the trucking industry, there is a difference between "rest" time and "fatigue." Rest time is not necessarily spent sleeping. *See* Reply Brief of Respondent at 4.

It is not necessary to decide what exact words a driver must utter to an employer in order to be deemed "fatigued." As stated above, I do not find the Complainant's testimony concerning his fatigue to be credible. In both incidents, he had time to notify the Respondent before the work call. The Complainant's allegations of fatigue were made only after he was given a work assignment. The facts do not demonstrate that the Respondent took adverse action against him for refusing to drive because of fatigue. The Respondent was justified in disciplining the Complainant because he did not follow company procedures. The Complainant failed to call off work before he received the dispatch calls on December 10, 1997 and March 21, 1998. Despite the fact that he had adequate rest, he refused the work calls. If the Complainant was in fact fatigued, it was by no fault of the Respondent. He deliberately made himself unavailable for work.

In support of the veracity of his claim of fatigue, the Complainant says the number of hours he had off do not prove he was rested. He has a pattern of sleeping at night and claims that his attempts to sleep during the day are not restful. Cited as support are studies mentioned in the

Federal Motor Carrier Safety Administration's (the "FMCSA") most recent rulemaking. The studies show that the body is subject to circadian rhythms proving that sleeping is more restful at certain times within the cycles. 65 F.R. 25553, 25541-25581.

The final rule reflects the FMCSA's use of that information as it relates to the practicalities of interstate trucking. Those rules are codified at 49 C.F.R. Part 395. 68 F.R. 22456. They represent the hours of driving and off duty necessary to protect the motoring public. A trucking company that sets a dispatch system in conformity with the rules cannot be found to have committed a violation, absent extraordinary circumstances in which the company deliberately takes action that causes abuse of the rules.

An example of such actions is when an employer places a driver "off duty" or "on duty (not driving)" for repeated periods. As a result, the driver becomes fatigued when he begins or continues to drive. *See generally Fitzgerald v. Interactive Logistics, Inc. or NFI Interactive,*2001-STA-52 (ALJ Nov. 13, 2002) (The Employer was found to have violated the hours of service regulations by requiring the employee to log in as "off duty" when he was actually "on duty (not driving))."

In this case there is no claim that such circumstances exist. The Respondent's dispatch system is in full compliance with the letter and spirit of the regulations.

The Complainant has been an interstate truck driver for many years. He has worked for the Respondent since 1988 (JX 10). He knows how the Respondent operates and has had years to adapt to their system.

The Complainant had sufficient time to obtain adequate rest. It was his responsibility. The Employer was in compliance with the regulations and has a practical and efficient dispatch system. The company did not contribute in any way to the Complainant's alleged fatigue. If he is unable to adapt to this system, he should not be working for this Employer. The Respondent cannot and should not be expected to change their dispatch system to be consistent with the Complainant's sleeping habits.

Findings and Conclusions

1. The Complainant did not engage in protected activity on December 10, 1997. 49 U.S.C. §§ 31105(a)(1)(B)(i) and 31105(a)(B)(ii).

2. The Respondent did not discipline the Complainant for engaging in protected activity on December 10, 1997.

3. On December 10, 1997, the Complainant deliberately made himself unavailable for work.

4. The Respondent is not responsible for the Complainant's alleged fatigue on December 10, 1997.

5. The Complainant did not engage in protected activity on March 21, 1998. 49 U.S.C. §§ 31105(a)(1)(B)(i) and 31105(a)(B)(ii).

6. The discipline that the Complainant received from the Respondent relating to the March 21, 1998 incident was not due to the Complainant's engagement in a protected activity.

7. The Respondent did not cause or contribute to the Complainant's alleged fatigue on March 21, 1998.

8. The Complainant deliberately made himself unavailable for work on March 21, 1998. Accordingly,

RECOMMENDED ORDER

Because the Complainant, Larry E. Eash, failed to prove that Respondent, Roadway Express, Inc. violated the STAA, I recommend that the above-captioned claim be dismissed.

A

GERALD M. TIERNEY
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).

APPENDIX A

The December 10, 1997 Incident

Activities	December 7, 1997	December 8, 1997	December 9, 1997	December 10, 1997
On Duty	-Earned 48 hours off duty after completing six tours of duty (JX 10). -Arrived at Copley, Ohio at 3:00 p.m. (JX 10).		-7:30 p.m. went on duty (JX 10). -Drove from Copley, Ohio to Buffalo, New York then back to Copley, Ohio (JX 10).	-7:15 a.m. went off duty (JX 10). -Eligible for a work call at 5:15 p.m. and a slide at 11:15 or 11:20 p.m. (Tr. 40-41). -Received dispatch call at 11:35 p.m. (JX 10).
Hours Off Duty	**9 hours**	**24 hours**	**19 hours and 30 minutes**	**16 hours and 20 minutes**
Sleep	8 hours 11:00 p.m.–7:00 a.m.) (Tr.26-27)	8 hours 11:00 p.m.–7:00 a.m.) (Tr.26-27).		6 to 7 hours 1:30 a.m. to 4:00 a.m. (JX 10). 8:30 a.m. to 12:00 or 1:00 p.m. (Tr. 37-39, 126-127, 128).

The March 21, 1998 Incident

Activities	March 19, 1998	March 20, 1998	March 21, 1998
On Duty	Completed a sixth tour of duty at 1:44 a.m. Earned forty-eight hours off duty (JX 10).		-Eligible for a work call at 1:44 a.m. -Received work call at 1:21 a.m. (JX 10).
Hours Off Duty	**22 hours and 16 minutes**	**24 hours**	
Sleep	6 hours and 30 minutes to 7 hours during the day (Tr. 69-71). -Slept from 11:00 p.m. to 7:00 a.m. (Tr. 71, 160).	-Attempted to sleep from 3:00 p.m. to 5:00 or 5:30 p.m. (Tr. 73-74, 161-162, 182). -Attended wife's party from 7:00 p.m. to 9:00 p.m. (Tr. 74, 161). -Went to bed at 9:30 p.m. Fell asleep approximately one to one and one-half hours after went to bed (Tr. 75).	

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CASE NO:	1998-STA-28
CASE CAPTION:	Larry E. Eash v. Roadway Express, Inc.
TITLE OF DOCUMENT:	Appendix B - Chart
DATE OF DOCUMENT:	December 18, 2003
JUDGE:	Gerald M. Tierney